

STATE BOARD OF PHARMACY
STATE OF MISSOURI

MISSOURI BOARD OF PHARMACY,

Petitioner,

v.

Case No. 07-0685 PH

Jerry H. Lopez, R.Ph.,

Respondent

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DISCIPLINARY ORDER**

This matter appears before the Missouri Board of Pharmacy pursuant to a Decision issued by the Administrative Hearing Commission as a result of a hearing between Missouri Board of Pharmacy and Jerry H. Lopez, R.Ph., in which the Administrative Hearing Commission decided that cause exists to discipline Mr. Lopez' license as a pharmacist. Each Board member participating in this decision read the Decision of the Administrative Hearing Commission and each exhibit and considered the Decision and each exhibit in reaching the decision reflected in this Order.

Findings of Fact

1. The Board set this matter for hearing and served notice of the disciplinary hearing upon respondent.
2. Pursuant to notice and Section 621.110, RSMo, this Board held a hearing on December 12, 2007, at the Courtyard by Marriott, 3301 LeMone Industrial Boulevard Columbia, Missouri, for the purpose of determining the appropriate disciplinary action against the pharmacist license of respondent. Jerry H. Lopez appeared in person and with counsel, Harvey Tettlebaum. The Board was represented by assistant attorney general William E. Roberts.
3. All Board members were present throughout the disciplinary hearing.

4. The Missouri Board of Pharmacy ("Board") is an agency of the state of Missouri created and established pursuant to Section 338.110, RSMo, for the purpose of executing and enforcing the provisions of Chapter 338, RSMo.

5. Respondent is licensed by the Board, License No. 2004035723, which license was current and active at the time of the incidents which form the basis of the charge.

6. The Decision has certain findings of fact that the Board incorporates by reference into this Order and forms the basis of the conclusion in that Decision that cause exists to discipline Mr. Lopez' pharmacist license.

7. The Board accepted into evidence exhibits offered by Lopez and incorporates by reference each of those exhibits. The Board carefully considered each exhibit in this Order.

Conclusions of Law

8. The Board has jurisdiction over this proceeding in that the Administrative Hearing Commission has determined that the Board has cause to discipline the license of the respondent. State Board of Registration for the Healing Arts v. Masters, 512 S.W.2d 150, 160-161 (Mo. App., K.C.D. 1974).

9. Respondent's license to practice as a pharmacist, numbered 2004035723, is subject to revocation, suspension, probation, or censure by the Board pursuant to the provisions of Section 338.055.2 (1), (5), (13), (15), and (17), RSMo.

Disciplinary Order

THISEFORE, having considered all of the evidence before this body, and giving full weight to the settlement agreement presented to the Board, it is the ORDER of the Missouri Board of Pharmacy that the pharmacist license issued to respondent, numbered 2004035723, be placed on PROBATION for five (5) years. This Order shall become effective ten (10) days from the date it is entered.

I. The following terms and conditions shall govern respondent's period of probation.

1. Respondent shall keep the Board apprised of his current home and work addresses and telephone numbers. If at any time respondent is employed by a temporary employment agency or maintains employment that requires frequent daily or weekly changes of work locations he must provide the board with all scheduled places of employment in writing prior to any scheduled work time.
2. Respondent shall pay all required fees for licensing to the Board and shall renew his license prior to October 31 of each licensing year.
3. Respondent shall comply with all provisions of Chapter 338, Chapter 195, and all applicable federal and state drug laws, rules and regulations and with all federal and state criminal laws. "State" includes the State of Missouri and all other states and territories of the United States.
4. Respondent shall make himself available for personal interviews to be conducted by a member of the Board or the Board of Pharmacy staff. Said meetings will be at the Board's discretion and may occur periodically during the disciplinary period. Respondent will be notified and given sufficient time to arrange these meetings.
5. Respondent's failure to comply with any condition of discipline set forth herein constitutes a violation of this disciplinary Order.
6. The Board of Pharmacy will maintain this Order as an open record of the Board as provided in Chapters 338, 610, 620, RSMo.
7. If, after disciplinary sanctions have been imposed, the licensee ceases to keep his Missouri license current or fails to keep the Board advised of his current place of employment and residence, such periods shall not be deemed or taken as any part of the time of discipline so imposed.
8. Respondent shall not serve as a preceptor for interns.
9. Respondent shall provide all current and future pharmacy and drug distributor employers and pharmacist/manager-in-charges a copy of this disciplinary order within five (5) business days of the effective date of discipline or the beginning date of each employment. If at any time respondent is employed by a temporary employment agency he must provide each pharmacy and drug distributor employer and pharmacist/manager-in-charge a copy of this disciplinary order prior to or at the time of any scheduled work assignments.

10. Respondent shall not serve as a pharmacist-in-charge or in a supervisory capacity without prior approval of the Board.

11. Respondent shall submit to blood tests and/or periodic urinalysis, at respondent's cost. The timing and/or scheduling for testing is within the Board's sole discretion.

12. Respondent shall report to the Board, on a preprinted form supplied by the Board office, once every six (6) months, beginning six (6) months after this Order becomes effective, stating truthfully whether or not he has complied with all terms and conditions of his disciplinary order.

13. Respondent shall complete an alcohol/drug abuse counseling and treatment program approved by the Board. Said program shall meet the requirements set forth in 20 CSR 2220-2.170 (6).

- A. Documentation required for counselor/program approval must be submitted to the Board office and respondent's counselor/program must receive Board approval within three (3) months after the effective date of this Order. Any unexpected or requested change in treatment counselor/program shall be submitted to the Board within ten (10) days of the change; and the program approval process must again be completed.
- B. Respondent shall, within six (6) weeks of the effective date of this Order, undergo an evaluation for chemical dependency performed by a licensed or certified chemical dependency professional. Respondent shall cause the results of the evaluation to be mailed directly to the Missouri Board of Pharmacy, P.O. Box 625, Jefferson City, Missouri 65102 within ten (10) days after the evaluation has been completed. Each evaluation report shall include the licensee's present state of impairment; a description of the tests performed and the results; discussion of relevant clinical interview findings/interpretations; specification of DSM IV diagnosis/es; appropriate treatment recommendations/plan; the beginning date of treatment; and an assessment for future prospects for recovery. If there is no diagnosis requiring treatment, this should be reported in the evaluation. Respondent

shall follow any treatment recommendations made by that chemical dependency professional.

- C. Respondent shall provide a copy of this Order to all chemical dependency professionals involved in respondent's treatment, and all medical professionals issuing/renewing a controlled substance, carisoprodol, nalbuphine, or tramadol prescription to respondent. Said disclosure shall be made before the evaluation required in Paragraph B, before the issuance of any new prescriptions and, in the case of renewed/refilled prescriptions, disclosure shall be made within ten (10) days of the effective date of this Order. Respondent shall simultaneously report to the Board office that said disclosure has taken place.
- D. Respondent shall execute a limited medical release effective for the entire disciplinary period authorizing any chemical dependency professional or medical professional to release records and/or communicate with the Board, or its representative, regarding respondent's treatment and/or counseling. Respondent shall not take any action to cancel this release. Respondent shall take all steps necessary to continue the release in effect and shall provide a new release when requested.
- E. Respondent shall cause a report of ongoing treatment evaluation to be submitted from the board-approved chemical dependency professional to the Board office on the schedule prescribed by 20 CSR 2220-2.170(6)(E). The report shall be completed by the treating professional within four weeks prior to the date it is due. The report shall include an evaluation of respondent's current progress and status related to the treatment recommendations/plan and respondent's current prognosis as well as revised treatment recommendations/plan.
- F. Respondent shall submit evidence of weekly (or counselor recommended) attendance at Alcoholics Anonymous, Narcotics Anonymous, or other support group meetings to the Board once every six (6) months throughout the disciplinary period. The documentation shall include the date, time, and

place of each meeting and shall bear a signature or abbreviated signature of another person verifying attendance.

- G. If the treatment of respondent is successfully completed at any time during the disciplinary period, respondent shall cause the board-approved chemical dependency professional to submit a report of final evaluation/summary.
- H. Respondent shall abstain completely from the use or consumption of alcohol in any form, including over-the-counter medications and mouthwashes. The presence of any alcohol metabolite whatsoever in a biological fluid sample shall constitute a violation of discipline.
- I. Respondent shall provide the Board office, within 10 days of the effective date of this Order, a copy of all controlled substance prescriptions, dispensed or to be dispensed, in respondent's possession on the effective date of discipline. The following information shall be provided: the prescription number, drug name, strength, dosage instructions, prescriber's name and address, the name and address of the pharmacy where the prescription was dispensed, date dispensed, number of refills available, and any other requested information concerning the prescription.
- J. Respondent shall abstain completely from the personal use or possession of any controlled substance or other drug for which a prescription is required unless use of the drug has been prescribed by a person licensed to prescribe such drug and with whom respondent has a bona fide relationship as a patient. Upon request, respondent shall execute a medical release authorizing the Board to access all records pertaining to respondent's condition, treatment, and prescription maintained by the health care professional that prescribed the controlled substance. The presence of any controlled substance whatsoever in a biological fluid sample for which respondent does not hold a valid prescription shall constitute a violation of discipline. Respondent shall provide the Board with a copy of each prescription received, controlled or non-controlled, within five (5) days of respondent's receipt of the prescription.

- K. Respondent shall inform any professional preparing a prescription for respondent that respondent is chemically dependent.

14. When the Well-being Committee created in 2007 by Senate Bill 195 is established, fully functional, and fully operational, respondent is required to become a participant in the Committee's program for the remainder of the disciplinary period. The Board will notify respondent when this occurs and respondent will bear all costs of the program.

15. Respondent shall undergo mental health counseling and/or treatment with a licensed and qualified mental health professional approved by the Board. Documentation required for counselor/program approval must be submitted to the Board office and Respondent's counselor/program must receive Board approval within three (3) months after the effective date of this Order. Any unexpected or requested change in treatment program/counselor shall be submitted to the Board within ten (10) days of the change; and the program approval process must again be completed.

- A. Respondent shall cause the mental health professional to submit to the Board office written documentation of his credentials and qualifications to provide treatment or counseling.
- B. Respondent shall cause a written agreement/contract between the mental health professional and licensee, outlining responsibilities of each party, to be executed. Said agreement/contract shall include a provision for sharing information concerning all aspects of therapy between facility and/or counselors and the Board of Pharmacy, and shall include a provision that any violation of the treatment agreement/contract shall be reported to the Board of Pharmacy within ten (10) days.
- C. Respondent shall, within six (6) weeks of the effective date of this Order, undergo an evaluation performed by a licensed mental health professional. The evaluation shall be for any clinically significant disorder which poses any risk to the safe practice of pharmacy (including chemical dependency). Respondent shall cause the results of the evaluation to be mailed directly to the Missouri Board of Pharmacy, P.O. Box 625,

Jefferson City, Missouri 65102 within ten (10) days after the evaluation has been completed. Each evaluation report shall include the licensee's present state of mental health; a description of the tests performed and the results; discussion of relevant clinical interview findings/interpretations; specification of DSM IV diagnosis/es; appropriate treatment recommendations/plan; the beginning date of treatment; and an assessment for future prospects for recovery. If there is no diagnosis requiring treatment, this should be reported in the evaluation. Respondent shall follow any treatment recommendations made by that professional.

- D. Respondent shall provide a copy of this Order to all mental health professionals involved in Respondent's treatment, and all medical professionals issuing/renewing a prescription to Respondent. Said disclosure shall be made before the evaluation required in Paragraph C, before the issuance of any new prescriptions and, in the case of renewed/refilled prescriptions, disclosure shall be made within ten (10) days of the effective date of this Order. Respondent shall simultaneously report to the Board office that said disclosure has taken place.
- E. Respondent shall execute a limited medical release effective for the entire disciplinary period authorizing any mental health professional or medical professional to release records and/or communicate with the Board, or its representative, regarding respondent's treatment and/or counseling. Respondent shall not take any action to cancel this release. Respondent shall take all steps necessary to continue the release in effect and shall provide a new release when requested.
- F. Respondent shall cause a report of ongoing treatment evaluation to be submitted from the board-approved mental health professional to the Board office once every 6 months, beginning 6 months after this Order becomes effective. The report shall be completed by the treating professional within four weeks prior to the date it is due. The report shall include an evaluation of respondent's current progress and status related

to the treatment recommendations/plan and respondent's current prognosis as well as revised treatment recommendations/plan.

- G. If the treatment of respondent is successfully completed at any time during the disciplinary period, respondent shall cause the board-approved mental health professional to submit a report of final evaluation/summary.

16. Respondent shall continue with the treatment plans as recommended by the Board approved treatment providers throughout the period of probation.

17. Respondent shall conduct an initial inventory at his place of employment upon the date this Order takes effect or on the first date of employment within any establishment that maintains an inventory of controlled substances on all controlled substances. The initial inventory shall be immediately available to a member of the Board or Board staff. The required inventory must be completed prior to or at the time of any scheduled work assignments.

18. If applicable, respondent shall notify any employer of the employer's need to apply for and receive the necessary state and federal waivers from the Bureau of Narcotics and Dangerous Drugs (BNDD) and the Drug Enforcement Administration (DEA) in order to be employed within a facility that maintains state and federal registrations for the purpose of storing, distributing, or dispensing controlled substances.

19. Should respondent violate any term or condition of this disciplinary order or any provision of Chapter 338, RSMo, the Board of Pharmacy may vacate the order of discipline imposed herein and order such further or additional discipline as the Board deems appropriate, including, but not limited to, revocation, suspension, and/or probation against the pharmacy permit of respondent. No additional order shall be entered by this Board pursuant to this paragraph of this Order without notice and an opportunity for hearing before the Board of Pharmacy as a contested case in accordance with the provisions of Chapter 536, RSMo.


20. Upon the expiration of the period of discipline, respondent's license shall be fully restored if all other requirements of law have been satisfied; provided, however, that in the event the Board determines that respondent has violated any term or condition of this Order, or any provision of Chapter 338, RSMo, the Board, may in its

discretion, vacate and set aside the terms and conditions of this Order and order such further or additional discipline as the Board deems appropriate.

21. If the Board determines that respondent has violated a term or condition of this Order, which violation would also be actionable in a proceeding before the Administrative Hearing Commission or the circuit court, the Board may elect to pursue any lawful remedies or procedures afforded it and is not bound by this Order in its determination of appropriate legal actions concerning that violation.

ENTERED THIS 29th DAY OF January, 2008

(BOARD SEAL)



DEBRA C. RINGGENBERG, R.Ph.
EXECUTIVE DIRECTOR
MISSOURI BOARD OF PHARMACY

Before the
Administrative Hearing Commission
State of Missouri

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MO. OFFICE
ATTORNEY GENERAL



MISSOURI BOARD OF PHARMACY,

Petitioner,

vs.

JERRY H. LOPEZ,

Respondent.

No. 07-0685 PH

DECISION

Jerry H. Lopez is subject to discipline because he used three controlled substances in violation of the laws and to the extent that his ability to perform his functions or duties as a pharmacist was impaired.

Procedure

On May 10, 2007, the Missouri Board of Pharmacy ("the Board") filed a complaint seeking to discipline Lopez, and the parties filed a joint stipulation of facts. The matter became ready for our decision on July 31, 2007, the date the last brief was due.

Findings of Fact

1. Lopez is licensed by the Board as a pharmacist. His license is, and was at all relevant times, current and active.
2. Lopez was employed as a staff pharmacist in the pharmacy at Children's Hospital-St. Louis ("Children's Hospital") at all relevant times.

A handwritten signature in dark ink, located in the bottom right corner of the page. The signature is stylized and appears to be a cursive representation of a name.

3. On or about March 17, 2005, Lopez reported for work impaired, with slurred speech, unsteady gait, glassy/watery eyes, and difficulty remembering specific statements. The pharmacy manager on duty observed these actions and requested that Lopez submit to a urine drug screen. Lopez's drug screen tested positive for morphine, codeine, and tetrahydrocannabinol (THC), the active ingredient in marijuana.

4. Lopez reported consuming his wife's medications, resulting in the positive drug screen.

5. Morphine,¹ codeine,² and marijuana³ are controlled substances.

6. At all relevant times, Lopez did not possess a valid prescription for any of the medications he possessed and consumed.

Conclusions of Law

We have jurisdiction to hear the Board's complaint.⁴ The Board has the burden of proving that Lopez has committed an act for which the law allows discipline.⁵ The Board argues that there is cause for discipline under § 338.055.2:

2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621, RSMo, against any holder of any certificate of registration or authority, permit or license required by this chapter or any person who has failed to renew or has surrendered his or her certificate of registration or authority, permit or license for any one or any combination of the following causes:

(1) Use of any controlled substance, as defined in chapter 195, RSMo, or alcoholic beverage to an extent that such use impairs a person's ability to perform the work of any profession licensed or regulated by this chapter;

* * *

¹Section 195.017.4(1)(a)m. Statutory references, unless otherwise noted, are to RSMo Supp. 2006.

²Section 195.017.8(1)(c)a.

³Section 195.017.6(7).

⁴Section 621.045.

⁵*Missouri Real Estate Comm'n v. Berger*, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).

(5) Incompetence, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of any profession licensed or regulated by this chapter;

* * *

(13) Violation of any professional trust or confidence;

* * *

(15) Violation of the drug laws or rules and regulations of this state, any other state or the federal government;

* * *

(17) Personal use or consumption of any controlled substance unless it is prescribed, dispensed or administered by a health care provider who is authorized by law to do so.

Subdivisions (13), (15), and (17)

Lopez admitted that he possessed the controlled substances without a valid prescription.

He violated § 195.202.1, RSMo 2000:

Except as authorized by sections 195.005 to 195.425, it is unlawful for any person to possess or have under his control a controlled substance.

Lopez admitted that he violated a professional trust or confidence. Professional trust is reliance on the special knowledge and skills that professional licensure evidences.⁶ It may exist not only between the professional and his clients, but also between the professional and his employer and colleagues.⁷ We agree that reporting for work as a pharmacist with slurred speech, unsteady gait, glassy/watery eyes, and difficulty remembering specific statements, and testing positive for three controlled substances violated the trust or confidence of his employer and clients. Lopez is subject to discipline under § 338.055.2(13), (15), and (17).

⁶*Trieseler v. Helmbacher*, 168 S.W.2d 1030, 1036 (Mo. 1943).

⁷*Cooper v. Missouri Bd. of Pharmacy*, 774 S.W.2d 501, 504 (Mo. App., E.D. 1989).

Subdivision (1)

The Board argues that Lopez is subject to discipline under § 338.055.2(1). Lopez argues that there is insufficient evidence for us to find that his use of controlled substances was “to an extent that such use impair[ed]” his ability to work as a pharmacist. The Board also addresses whether Lopez was impaired.⁸ We disagree with Lopez. We need no expert testimony to determine that Lopez’s condition – slurred speech, unsteady gait, glassy/watery eyes, and difficulty remembering specific statements – impaired his ability to perform the complex work of a pharmacist. Lopez is subject to discipline under § 338.055.2(1).

Subdivision (5)

The Board argues that Lopez’s conduct evidenced incompetence, misconduct and gross negligence. Incompetence refers to a general lack of, or a lack of disposition to use, a professional ability.⁹ Misconduct means “the willful doing of an act with a wrongful intention[;] intentional wrongdoing.”¹⁰ Gross negligence is a deviation from professional standards so egregious that it demonstrates a conscious indifference to a professional duty.¹¹ We may infer the requisite mental state from the conduct of the licensee “in light of all surrounding circumstances.”¹²

In order to find cause for discipline under § 338.055.2(5), Lopez must have been acting “in the performance of the functions or duties” of a pharmacist. We find that he was doing so on March 17, 2005, when he reported to work as a pharmacist in the physical condition described above and tested positive for controlled substances. A pharmacist’s functions or duties include

⁸We note that one reading of the statute would limit the requirement of proving impairment to alcohol use, and proof of use of a controlled substance would appear to be sufficient to impose discipline.

⁹*Johnson v. Missouri Bd. of Nursing Adm’rs*, 130 S.W.3d 619, 642 (Mo. App., W.D. 2004).

¹⁰*Missouri Bd. for Arch’ts, Prof’l Eng’rs & Land Surv’rs v. Duncan*, No. AR-84-0239 (Mo. Admin. Hearing Comm’n Nov. 15, 1985) at 125, *aff’d*, 744 S.W.2d 524 (Mo. App., E.D. 1988).

¹¹*Id.* at 533.

¹²*Id.*

lawfully dispensing and handling controlled substances. Reporting for work with illegal drugs in his system constitutes misconduct. We do not find that the single incident evidences incompetence. Because the mental states for misconduct and gross negligence are mutually exclusive, we find no cause to discipline for gross negligence. Lopez is subject to discipline under § 338.055.2(5).

Summary

Lopez is subject to discipline under § 338.055.2(1), (5), (13), (15), and (17).

SO ORDERED on August 30, 2007.



JOHN J. KOPP
Commissioner